BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2017-305-E

IN RE:

Request of South Carolina Office of Regulatory Staff for Rate Relief to SCE&G Rates Pursuant to S.C. Code Ann. § 58-27-920	**INDEX AND TABLE OF AUTHORITIES FOR SCE&G'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS**

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BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2017-305-E

IN RE:

Request of South Carolina Office of Regulatory Staff for Rate Relief to SCE&G Rates Pursuant to S.C. Code Ann. § 58-27-920	)))))	**SCE&G'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS**

South Carolina Electric & Gas Company ("SCE&G" or the "Company"), by and through the undersigned counsel and pursuant to 10 S.C. Code Ann. Regs. 103-829 and Order No. 2017-58-H, hereby submits this Reply Brief in Support of its Motion to Dismiss the Request for Rate Relief (the "Request") filed by the South Carolina Office of Regulatory Staff ("ORS").

INTRODUCTION

Six briefs have been filed in support of ORS's position here. Yet none has attempted to show that ORS has conducted a preliminary investigation concerning whether the rates it has requested are fair and reasonable as that term is defined by law. The statute under which ORS filed requires such a preliminary investigation as an absolute prerequisite to its Request. *See* S.C. Code Ann. § 58-27-920. But none of the ***six*** Opposition Briefs[1] point to any analysis or

[1] As used herein, the term "Opposition Briefs" collectively refers to the briefs filed in opposition to SCE&G's Motion by the following parties: (i) ORS; (ii) the Attorney General of South Carolina; (iii) AARP; (iv) Speaker of the South Carolina House of Representatives James H. "Jay" Lucas; (v) the South Carolina Coastal Conservation League; and (vi) the South Carolina Energy Users Committee. While not an Opposition Brief, this Reply Brief is also in response to the letter of Lynn Teague and supporting affidavits filed November 17, 2017.

investigation showing that the rates requested would meet a fair and reasonable standard established by law.

The law defines a "reasonable rate" as one that, at a minimum, allows a utility to earn a return that is "sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital." *Bluefield Waterworks & Imp. Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 692–93 (1923) (citations omitted). That return must be

> reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.

Id. (citations omitted). These are "the basic principles of utility rate regulation" in South Carolina applied both by the courts[2] and the Commission.[3] This definition has constitutional force and scope under the Takings Clause of the United States Constitution. Meeting this definition is an absolute requirement of any lawful rate.[4] Showing that this standard was met should have been the focus of the preliminary investigation that ORS was required to conduct and submit with its Request but did not. ORS's failure to perform the required preliminary investigation is fatal to any further proceedings in this docket, and the Request should be dismissed for that reason alone.

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[2] *See, e.g., S. Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 270 S.C. 590, 595, 244 S.E.2d 278, 281 (1978), *holding modified by Parker v. S.C. Pub. Serv. Comm'n*, 280 S.C. 310, 313 S.E.2d 290 (1984); *Patton v. S.C. Pub. Serv. Comm'n*, 280 S.C. 288, 291, 312 S.E.2d 257, 259 (1984).

[3] *See, e.g.*, Order No. 2016-871, Docket No. 2016-227-E; Order No. 2012-951, Docket No. 2012-951 (Dec. 20, 2012); Order No. 2010-471, Docket No. 2009-489-E (July 15, 2010); Order No. 2005-2, Docket No. 2004-178-E (Jan. 6, 2005).

[4] "Every rate made, demanded or received by any electrical utility . . . shall be just and reasonable." S.C. Code Ann. § 58-27-810. "Whenever the commission after a hearing finds that the existing rates in effect and collected by any electrical utility are unjust, unreasonable, insufficient, unreasonably discriminatory, or in any way in violation of any provision of law, the commission shall determine the just, reasonable, and sufficient rates to be thereafter observed and in force . . . ." S.C. Code Ann. § 58-27-850. These statutes echo the controlling language of the cases applying the Takings Clause of the United States Constitution and adopts a standard that is not materially different from the "fair and reasonable" standard contained in S.C. Code Ann. § 58-27-920.

Nor do any of the six Opposition Briefs rebut SCE&G's overwhelming and affirmative showing that ORS's Request ***cannot*** result in rates that are fair and reasonable as the law requires. The rates ORS requests here are demonstrably ***unreasonable*** because if imposed they will profoundly damage SCE&G's financial sustainability, endanger its ability to continue to operate as a viable utility, and prevent it from accessing the capital needed to serve customers. No party has attempted to rebut SCE&G's demonstration that this is the case.

For that reason, the relief that ORS seeks here is clearly illegal, unconstitutional, and outside the statutory powers of the Commission.

LEGAL ANALYSIS

I. ORS STILL HAS NOT ESTABLISHED THAT ITS PROPOSED RATES ARE FAIR AND REASONABLE.

By statute, ORS is ***required*** to support its Request with an explanation of how the rates it proposes for adoption are fair and reasonable. Indeed, § 58-27-920 states that:

> The commission may, after a preliminary investigation by the Office of Regulatory Staff and upon such evidence as to the commission seems sufficient, order any electrical utility to ***put into effect a schedule of rates as shall be deemed fair and reasonable.***

S.C. Code Ann. § 58-27-920 (emphasis added). Moreover, a hearing on proposed rates can only take place after the Commission orders the utility to charge the rates proposed by ORS. *See* S.C. Code Ann. § 58-27-930. Accordingly, ***before*** initiating proceedings under this statute, ORS must perform a "preliminary investigation," and the Commission must determine based on its review of that "preliminary investigation" that the requested rates are "fair and reasonable." If ORS fails to conduct a preliminary investigation ***or*** fails to show that the ***resulting rates*** (not just the request itself) would be fair and reasonable, then the Commission's only recourse is to dismiss the Request because there is no other basis on which this proceeding can go forward.

In its Brief, ORS argues that it has performed a preliminary investigation by "reviewing the Attorney General Opinion and consider[ing] allegations about information and documents that had been withheld by SCE&G from ORS and the Commission, including a previously undisclosed Bechtel Report."[5] (ORS Br., ¶ 23). ORS also argues that it has asserted factual allegations sufficient to be considered "evidence" related to certain administrative discovery matters. (*Id.*, ¶¶ 24-31.) But reviewing an Attorney General's opinion on the BLRA and raising disputes about SCE&G's past discovery responses and disclosures does not constitute an "investigation" concerning proposed rates, nor can such a review constitute evidence sufficient to establish that the rates proposed by ORS may be deemed to be "fair and reasonable," "just and reasonable" or "just, reasonable and sufficient" as the law requires. *See* S.C. Code Ann. §§ 58-27-810, 58-27-850, 58-27-920.

A. The Bechtel Report

ORS wrongly suggests that its Request is factually justified because SCE&G did not disclose the February 6, 2016 Bechtel Project Assessment Report (the "Bechtel Report") to ORS in response to ORS Audit Information Request No. 1-32, and that ORS did not see the Bechtel Report until September 5, 2017. As a practical matter, the substantive issues discussed in the Bechtel evaluation had been disclosed apart from that evaluation as shown in Appendix C to SCE&G Brief in Support of Its Motion to Dismiss.

Furthermore, the Bechtel Report was a privileged document, prepared under the direction and oversight of an outside litigation attorney in anticipation of litigation with Westinghouse Electric Company, LLC ("Westinghouse") and Chicago Bridge & Iron ("CB&I"). SCE&G was never called on to formally assert privilege as to this document

[5] The fact that the substantive findings of the Bechtel Report had been disclosed to ORS and the public was addressed in Appendix C to SCE&G Brief in Support of Its Motion to Dismiss.

because ORS never requested it in discovery or in any other way that would have required an assertion of attorney-client or work product protections in response.

ORS bases its argument on the misplaced assertion that Audit Information Request No. 1-32 called for the production of the Bechtel Report. It did not.

The outside attorney who represented SCE&G and Santee Cooper in their disputes with Westinghouse and CB&I hired, directed and oversaw an evaluation by Bechtel to inform litigation strategy. That attorney hired Bechtel on August 6, 2015.

Bechtel began its work shortly thereafter and ORS was aware of Bechtel's work as early as August 25, 2015. By October of that year, Bechtel had completed most or all of its on-site investigation and data review. In October of 2015, ORS apparently understood that the Bechtel work was substantially done because ORS personnel asked SCE&G employees if they could provide ORS with an oral briefing concerning Bechtel's findings.[6] ORS admitted before the South Carolina Senate V.C. Summer Nuclear Review Committee on September 18, 2017, that the only written communication it made to SCE&G concerning the Bechtel Report occurred in October 2015.[7]

On October 27, 2015, SCE&G and Santee Cooper entered into an agreement with Westinghouse to amend the Engineering, Procurement and Construction Agreement under which the Units were being constructed (the "October 2015 EPC Contract Amendments"). The October 2015 EPC Contract Amendments allowed CB&I to exit the project, thus resolving in advance one of the Bechtel Report's key observations, *i.e.,* that consortium arrangement between Westinghouse and CB&I was not functioning effectively at that time. SCE&G

[6] See Exhibit 1, October 27 & 28 ORS Site Visit Agenda with Notes, at page 5, Section IV(d).

[7] Exhibit 1, p. 26.

promptly disclosed the October 2015 EPC Contract Amendments to ORS, the Commission and the public.

The October 2015 EPC Contract Amendments, at Section 22, contained a provision that reads as follows: "The Parties agree to cooperate with respect to the involvement of the Owner's Project consultant and/or Owner's Engineer with work scheduled to be done by Owner's consultant."

Bechtel was not retained to serve as Owner's Project consultant and/or Owner's engineer pursuant to the October 2015 EPC Contract Amendments. In fact, Bechtel's assessment was nearing completion by October 2015 when the 2015 EPC Contract Amendments were being adopted and had concluded by February of 2016.

On March 4, 2016, ORS served upon SCE&G a document captioned as "October 2015 Amendments to Engineering, Procurement and Construction Contract Related to the Construction of a Nuclear Baseload Generation Facility at Jenkinsville –ORS First Continuing Request for Records and Information." The request consisted of 47 numbered items. All of these items concerned the October 2015 EPC Contract Amendments.

Request 1-32 March 4, 2016 Information Request read as follows:

REQUEST 1-32:

> Has SCE&G decided to retain the services of a Project Consultant as allowed in the Agreement? What are the costs associated with these services? Are these costs included in the current estimate of the Owner's Cost? Has a contract been awarded? If so, to whom? If this decision has not yet been made, please advise the target schedule for making a decision or implementing this service.

Exhibit 1, p.13.

This request shows that in March of 2016 ORS understood and accepted the following facts which are entirely inconsistent with the assertion that Request 1-32 concerned Bechtel:

(a) ***"Has SCE&G decided to retain the services of a Project Consultant as allowed in the Agreement?"*** ORS understood that the decision to hire or not hire a Project Consultant was optional under the October 2015 EPC Contract Amendments, had not been made at the time of the amendment, and might not have been made as late as March of 2016. ORS also knew that Bechtel had been hired in August of 2015 and its work was nearing completion by the end of October 2015. ***Exhibit 1*** at 5.

(b) ***"Has a contract been awarded?"*** ORS understood that hiring a Project Consultant would result in a new contract which might or might not have been awarded in March 2016. ORS would have understood that the contract associated with Bechtel's work --which began in August of 2015-- would have been awarded long before March of 2016.

(c) "***Are these costs included in the current estimate of the Owner's Cost?"*** ORS understood that the costs associated with the Project Consultant's contract would be new, forward-looking costs that might or might not have been added to the forecasts of Owner's Cost that were current at the time. ORS would have also known that costs associated with Bechtel's work that began in 2015 would have been incurred before March of 2016 and would not have been considered to be forecasted costs at that time.

The questions included in Audit Information Request No. 1-32 are entirely inconsistent with the current assertion that this request was meant to elicit information concerning the

Bechtel assessment. That assessment was conducted entirely independently of the October 2015 EPC Contract Amendments and completed well before March of 2016.

That the Bechtel Report was in no way responsive to ORS's request is further confirmed by the actions—and inactions—of ORS after receiving SCE&G's responses to ORS's Audit Information Requests. On March 24, 2016, SCE&G responded to Request 1-32 as follows:

RESPONSE 1-32:

> Yes. SCE&G has decided to retain the services of at least two project consultants for consultation as to the process for the selection of construction payment milestones. One of the consultants, Work Management, Inc., has already performed its services, and SCE&G expects that the cost of those services will be less than $5,000. The second company has not yet signed a contract or provided any services, but the costs should not exceed $25,000. There are sufficient funds in the Owner's Cost category to cover these amounts.

Exhibit 1, p. 16.

After receiving SCE&G's responses to ORS's Audit Information Requests dated March 4, 2016, ORS asked SCE&G on April 12, 2016, to supplement 31 of SCE&G's 47 original responses. However, ORS did not ask SCE&G to supplement its response to ORS Audit Request No. 1-32, indicating thereby that ORS was satisfied with that response.

On June 24, 2016, SCE&G supplemented its original response to Audit Request No. 1-32 with additional information.

FIRST SUPPLEMENTAL RESPONSE 1-32:

> SCE&G retained the consulting services of Work Management, Inc. concerning the selection of construction payment milestones. These consulting services were provided at no cost to SCE&G. With regard to the second consultant company referenced in

> Response 1-32, SCE&G has elected to not pursue the hiring of this company.

Exhibit 1, p. 19.

After ORS received SCE&G's supplemental response, ORS did not request additional information from SCE&G or inform the Company that it had not provided the information ORS's question was designed to produce. On or about July 18, 2017, SCE&G supplemented its response to ORS Audit Request No. 1-32 a second time.

> **SECOND SUPPLEMENTAL RESPONSE 1-32:**
>
> After deciding not to purse [sic] the hiring of the second consultant company referenced in SCE&G's First Supplement Response, 1-32 above, SCE&G has now decided to retain the services of another project consultant, Secretariat International, Inc., to assist the Company with the construction milestone payment schedule. As stated in Response 1-32 above, there are sufficient funds in the Owner's Cost category to cover this expense.

Exhibit 1, p. 20.

Again, ORS never requested additional information or informed SCE&G that the Company had not provided the information that ORS's question was designed to produce. ORS never objected to SCE&G's responses, despite knowing that Bechtel had previously been on-site nor had ORS ever sought any relief compelling SCE&G to respond to Audit Request No. 1-32 in any other manner than it did.

During the course of the new nuclear project, ORS has asked SCE&G hundreds of audit questions which the Company has answered. If ORS had wanted information about the Bechtel Report, it certainly possessed the knowledge and capability to draft a request asking to be provided with the Bechtel Report. ORS never did.

The relevant documents are attached hereto and incorporated herein as ***Exhibit 1***. As mentioned earlier, the fact that the substantive issues discussed in the Bechtel evaluation had been disclosed to ORS and the public was addressed in Appendix C to SCE&G Brief in Support of Its Motion to Dismiss.

B. ORS's Table of Revised Rates Orders

ORS also asserts that "the table in its Request showing the revenue increases from each revised rates proceeding provides evidence to the Commission in considering and setting 'fair and reasonable' rates." (*Id.*, ¶ 33.) This argument admits that ORS's "investigation" concerned only past Commission orders and the rates imposed by them. Such an investigation could in no way satisfy ORS's legal obligation to establish that the "result reached" by the rates ORS now requests would be fair and reasonable and not unreasonable and confiscatory as SCE&G has shown. *See Bluefield Waterworks & Imp. Co.*, 262 U.S. at 692–93. To the contrary, this table shows only that the Commission has approved nine prior increases over an eight year period, all of which were based on ORS's audits, recommendations and approval, and all of which are now embodied in final and unappealable orders of the Commission. (*See* Request, ¶ 11.) This table – which only looks backwards – cannot possibly show that the requested schedule of rates ORS now requests would produce a fair and reasonable result if imposed on SCE&G going forward.[8]

If for some reason the BLRA was found not applicable (and that is not the case), or prior rate orders were overturned (and there are no grounds here to do so), then the

[8] ORS mentions in its Brief that it could have pled a request for rate relief pursuant to S.C. Code Ann. § 58-27-850. (*See* ORS Br., ¶ 22.) By doing so, ORS admits that it did not plead any request for relief under that statute, making this statement irrelevant. Furthermore, the relief requested by ORS here could not be granted under S.C. Code Ann. § 58-27-850 because that statute would require the Commission after hearing to "determine the just, reasonable, and sufficient rates to be thereafter observed and in force and shall fix the rates by its order." It is precisely this failure of ORS to investigate whether the rates it requests the Commission to impose would be just, reasonable and sufficient that is at the heart of this Motion to Dismiss.

Commission would be required to determine what a reasonable rate would be. That would require the Commission to determine what portion of SCE&G's investment in the nuclear project was in fact abandoned. (A significant portion of SCE&G's investment in the project represents transmission assets which will go into service in the coming months and would not properly be considered to be abandoned costs.) Furthermore, even in the absence of the BRLA, there is no law or general rule that all abandoned utility costs are unrecoverable. See *People's Org. for Wash. Energy Res. v. Wash. Util. & Transp. Comm'n*, 104 Wash. 2d 798, 819, 711 P.2d 319, 331 (1985); *accord State ex rel. Util. Comm'n v. Thornburg*, 325 N.C. 463, 476, 385 S.E.2d 451, 458 (1989). The Commission would have to determine what would constitute a just and reasonable result when applying the pre-BLRA rules related to abandoned plant costs. The Commission would further need to evaluate and take testimony on such fundamentally important rate making matters as SCE&G's current capital structure, cost of capital, retail electric sales and utility operating expenses.

Before asking for rates to be imposed under S.C. Code Ann. § 58-27-920, ORS should have evaluated all of these questions in a preliminary investigation, which it should have submitted to the Commission to justify its request. ORS failed to do so, and as a result, the Commission must reject ORS's Request.

II. SCE&G'S ASSERTION THAT THE PROPOSED RATES WOULD BE UNFAIR AND UNREASONABLE STANDS UNCHALLENGED.

SCE&G has presented ample affirmative evidence that the rates requested by ORS would be anything but fair and reasonable.

On September 28, 2017, two days after ORS filed its Request, SCE&G moved for its dismissal pointing out that the Request makes no effort to show that ORS has fulfilled its statutory duty to show that the rates it proposed were fair and reasonable. To avoid any

misunderstanding about the implications of this Request, SCE&G submitted an affidavit of its Chief Financial Officer, Jimmy Addison. That affidavit shows how the rates ORS proposes could fatally injure the finances of the Company if adopted:

> It is my opinion, based on my knowledge of the investment community and to a high degree of certainty, that granting the relief requested by ORS could endanger SCE&G's access to the capital it needs to invest in its utility system to continue to serve its customers in a safe and reliable manner.
>
> The rates that will result from granting the relief sought in the Request would not be just and reasonable or fair and reasonable as I understand those terms because they would not support the financial integrity of the utility nor would it allow the utility reasonable access to the capital it needs to operate its system and serve its customers on reasonable terms.

(Sept. 28, 2017 Addison Aff., at 2.)

On October 31, 2017, SCE&G filed its principal brief in this matter pointing out, yet again, that ORS defaulted on its statutory obligations by failing to conduct the required investigation and showing, yet again, that ORS's proposed rates are unquestionably unfair, unjust, and unreasonable. The Affidavits of Byron Hinson and Jimmy Addison filed as Exhibits 1 and 2 to SCE&G's SCE&G Brief in Support of Its Motion to Dismiss establish that ORS's proposed rates could destroy SCE&G's access to credit, injure its ability to function as a utility, trigger multi-billion dollar write-downs, cripple SCE&G's creditworthiness, and potentially make it impossible for SCE&G to function as an effective utility.

As of the date of this filing, Mr. Addison's and Mr. Hinson's conclusions remain unchallenged. Neither ORS nor any other party has attempted to refute them or demonstrate that the rates ORS seeks to impose on SCE&G would support SCE&G's creditworthiness, or otherwise allow SCE&G to continue functioning as a financially sound or even viable utility.

Multiple parties have intervened to support ORS, including the Attorney General of the State, the Speaker of the House of Representatives, the Energy Users Committee and other

parties who are experienced in litigation before the Commission. None of them have sought to refute Mr. Addison's or Mr. Hinson's statements or to show that ORS's proposed rates would meet the statutory and Constitutional standards required for them to be adopted.

To further remove any doubt as to these matters, and in response to the affidavits presented by Ms. Teague, SCE&G has attached to this brief the affidavits of two outside experts, Mr. Robert Hevert and Ms. Ellen Lapson, to support the conclusions previously expressed.

Mr. Robert Hevert is a rate of return expert whose testimony has been relied upon by the Commission in setting rates for SCE&G in several past proceedings.[9] Mr. Hevert has conducted a full cost of capital study for SCE&G based on current conditions. That study (***Exhibit 2***) shows that under current conditions investors would reasonably expect a rate of return on equity of 10.75% on an enterprise of comparable risk to SCE&G. He also confirms Mr. Hinson's calculation that the rates proposed by ORS would result in a rate of return on equity below 3.5%, which would be patently insufficient to support the financial soundness of SCE&G as a utility.

Ms. Ellen Lapson is a former utility banker and ratings analyst for Fitch with 37 years of experience in the utility sector. She has extensive knowledge of all recent U.S. utility bankruptcies. She – like Mr. Addison – attests to the devastating impact that granting ORS's Request would have on SCE&G and SCANA. More specifically, she states that granting the Request could:

- Cause SCE&G to default on its $900 million of existing revolving credit agreements, rendering those debts immediately due and payable, and pushing the Company into a liquidity crisis;

[9] *See* Docket No. 2012-218-E; Docket No. 2009-489-E

- Result in at least two of the three rating agencies downgrading SCE&G's credit rating below investment grade, thereby rendering SCE&G ineligible for funding in the commercial paper market and substantially curtailing the sources of capital available to SCE&G in the future;

- Weaken SCE&G's ability to fund investments in its utility system leading to deteriorating levels of reliability and customer service;

- Hinder SCE&G's ability to mount a timely and effective storm restoration plan in the event of hurricanes, tornadoes, floods, fires, or other natural disasters, such as has occurred in Puerto Rico in the wake of Hurricane Maria; and

- Place SCE&G under such cash flow stress that its access to funding in 2018 would be insufficient to cover its expenses and obligations pushing it into insolvency.

Exhibit 3, at 15-23.

Based on all of these factors, Ms. Lapson concludes that granting ORS's Request "could be the first step in a quick cascade that would result in SCE&G's illiquidity and financial distress and could lead to a bankruptcy petition." (***Exhibit 3*** at 21.) Ms. Lapson is clear that bankruptcy is not inevitable at this point, but that "[b]y granting the ORS Request, the Commission would take a first step in hastening that cascade of financial calamity . . . ." No one –customers, South Carolina or the Company-- would benefit were this to occur:

> In my experience, a utility bankruptcy proceeding is a time-consuming and wasteful process. Thousands of hours of the utility's management and of the time of the Commissioners and commission staff would be consumed, and this is a distraction from the necessary work of normal operations, planning, and oversight. The median length of a utility bankruptcy proceeding in the modern era is approximately three years, and some cases have gone on for more than four years. During such proceedings, hundreds of millions of dollars are spent on bankruptcy counsel, specialized accounting services, and other bankruptcy professionals, and these are dollars that would otherwise be available to satisfy the utility's customers, but instead are consumed in a process that is outside of the control of the Commission.

(Exhibit 3 at 22.) There is, of course, nothing in the ORS's "preliminary" investigation assessing the likelihood of an SCE&G bankruptcy should the rates proposed in the Request be

imposed. Nor is there any assessment of the likely effect of bankruptcy on SCE&G customers or on South Carolina's industrial development prospects and industrial competitiveness during the three to four year period involved.

All of these affidavits – from Addison, Hinson, Hevert, and Lapson – confirm that it is not possible for the Commission to deem the requested rates to be just and reasonable or fair and reasonable based on the information presented here. For these reasons, ORS's Request should be dismissed.

III. THE ATTORNEY GENERAL'S ASSAULT ON THE BASE LOAD REVIEW ACT IS BOTH INAPPROPRIATE TO THIS PROCEEDING AND LEGALLY UNFOUNDED.

The Attorney General has submitted an 86-page brief that cites approximately 180 individual cases. None of those cases, however, provide any substantial authority supporting his claim that the BLRA is unconstitutional. Reduced to its core, the Attorney General's argument is that administrative agencies and the courts should have the unilateral power to overrule statutes duly enacted by the General Assembly where they believe that the General Assembly did not properly construe the public interest as concerns ratemaking. That is not the law.

Furthermore, all parties recognize that administrative agencies have no power to rule that statutes duly adopted by the General Assembly are unconstitutional. Only the courts have that power. Therefore any issues related to the constitutionality of the BLRA are not properly before the Commission in this proceeding. The Commission's clear legal duty is to assume that the BLRA is constitutional and apply its terms as written.

A. The Commission Should Dismiss ORS's Request Because It Is a Facial Challenge to the BLRA's Constitutionality, and the Commission Does Not Have the Authority to Rule on Such a Challenge.

The Attorney General and ORS attempt to avoid the rule prohibiting administrative bodies from invalidating statutes by arguing that their challenge to the BLRA is not a facial challenge but a challenge to the BLRA as applied. (*See* Request, ¶ 14; *see also* Att'y Gen. Br. at 2-4.) But this argument is transparently unsupportable. The Attorney General and ORS do not raise constitutional claims that are limited to the unique facts of the present case. They argue – wrongly but insistently – that ***any*** recovery of costs related to abandoned utility plants is unconstitutional because abandoned plants are not used and useful; that ***any*** statutory provisions that allow for such recovery is void; and that ***any*** statute that makes a preconstruction prudency determination binding in future rate proceedings is a violation of due process. There is nothing in the Attorney General's Opinion or Brief or ORS's Brief that attempts to distinguish the application of the BLRA in this case from any other case in which the application of the BLRA's abandonment or finality provisions might be applied. They make no effort to point to ***any other*** circumstances where these provisions of the BLRA might lawfully apply. This is a text book example of a facial challenge to statutory provisions. As flawed as the ORS and Attorney General arguments are, they are indisputably claims that go to the validity of the BLRA in general and on its face, and not as applied to the "unique" circumstances of this case.

The character of an action as involving a facial or as-applied challenge "is not determined by the terminology which the pleaders may chance to give it." *Walsh v. Evans*, 112 S.C. 131, 131, 99 S.E.2d 546, 548 (1919); *see also Winn v. Grantham*, 263 S.C. 368, 372, 210 S.E.2d 602, 604 (1974) (stating the same). Rather, it is "fixed by the events which the pleaders have recited." *Walsh*, 112 S.C. at 131, 99 S.E.2d at 548.

A facial challenge "is an attack on a statute itself as opposed to a particular application." *State v. Legg*, 416 S.C. 9, 13, 785 S.E.2d 369, 371 (2016). A constitutional challenge to a statute can only be categorized as an "as-applied" challenge where, "despite some possibly impermissible application," the statute also "covers a ***whole range of easily identifiable and constitutionally*** [permissible applications]." *Sec'y of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 964-65 (1984) (emphasis supplied) (internal citation and quotation marks omitted).

Where, as here, the remedy sought is invalidation of a statutory provision, a challenge must be characterized as a facial challenge, not an as-applied challenge. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010). Indeed, courts often reject a plaintiff's characterization of a constitutional challenge as being "as-applied," when the remedy sought is facial invalidation.[10]

The Attorney General's Advisory Opinion – on which ORS's Request is based – supports its constitutional claim by arguing that the BLRA ***in general, and not as applied here***:

- "[F]ails to strike the constitutionally required balance between investors and ratepayers;"
- "[D]enies ratepayers procedural due process;" and

[10] *See, e.g., Kennedy v. Techtronic Indus. N. Am., Inc.*, Civ. A. 8:13-871-BHH, 2014 WL 4929349, at *4 (D.S.C. Sept. 29, 2014) ("The plaintiff would characterize some of his constitutional challenge, 'as applied.' Notwithstanding the nomenclature, the plaintiff's objection still appears facial in nature."); *Isaacson v. Horne*, 716 F.3d 1213, 1230 (9th Cir. 2013) (determining that the plaintiffs' "as applied" challenge to an anti-abortion statute was really a facial challenge because there was "a one hundred percent correlation between those whom the statute affects and its constitutional invalidity as applied to them"); *Citizens United*, 558 U.S. at 331 (finding that the plaintiff's "as-applied" challenge to a campaign finance law was really a facial challenge to the statute because the question presented by the case implicated the facial validity of the act); *see also Mohamed v. Holder*, No. 1:11CV0050(AJT/MSN), 2017 WL 3086644, at *4 (E.D. Va. July 20, 2017); *Am. Family Ass'n, Inc. v. F.C.C.*, 365 F.3d 1156 (D.C. Cir. 2004).

- "[R]ewards abandonment of nuclear projects such that ratepayers must pay the utility's costs plus a substantial rate of return for investors without receiving any service from the plants."

(*Id.*) Elsewhere, the Attorney General states that "the overarching defect in the BLRA is that it does not serve the 'public interest.'" (Att'y Gen. Br. at 55.) None of these arguments are limited to the specific circumstances surrounding the V.C. Summer Project or SCE&G. To the contrary, the Attorney General and ORS are suggesting that the BLRA fails to strike the constitutionally required balance between ***all*** investors and ***all*** ratepayers, that it denies ***all*** ratepayers procedural due process, that it ***always*** rewards abandonment of nuclear projects, and that the act, ***as a whole***, does not serve the public interest. Said differently, the Attorney General and ORS argue that certain provisions of the BLRA are invalid as applied to every utility company seeking rate increases pursuant to the BLRA. Moreover, neither the Attorney General nor ORS have identified a single scenario in which the provisions of the BLRA that they challenge would be constitutional.

ORS's Request raises a facial challenge to the constitutionality of the BLRA. Thus, this Commission does not have jurisdiction to rule on the Request and it should be dismissed. *See Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue*, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000) (holding that agencies "have no authority to pass upon the constitutionality of a statute or regulation").

B. The Authorities Cited in the Attorney General's Brief Do Not Support the Claim that the Used and Useful Test Is Constitutionally Mandated.

None of the Attorney General's approximately 180 cases hold that the used and useful test is constitutionally mandated and that the General Assembly cannot lawfully adopt a

different standard.[11] In fact, the cases cited hold that it is "the result reached not the method employed" that is important to the constitutional assessment.[12] Clearly, in a results-oriented constitutional framework, the choice of rate making principles is left to the General Assembly in the first instance as the principal legislative body in the State. The fact that no specific rate making methodology is constitutionally mandated strongly supports the conclusion that the BLRA was a valid exercise of the General Assembly's power.

C. The Authorities Cited in the Attorney General's Brief Do not Support the Claim that the Prudent Investment Principle Is Unconstitutional.

None of the Attorney General's approximately 180 cases hold that the prudent investment principle is unconstitutional as a violation of "ratepayer fairness" or any other asserted constitutional standard. The Attorney General relies extensively on the Arizona case *Simms v. Round Valley Light and Power Co.*, 294 P.2d 378 (Ariz. 1956), to support its argument that the prudent investment rule is unconstitutional. However, the Arizona Constitution specifically states that the Corporation Commission of Arizona shall "ascertain

[11] *See S. Bell v. Pub. Service Comm'n*, 270 S.C. 590, 244 S.E.2d 278 (1978); *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679 (1923); *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944); *Darby v. Southern Ry. Co.*, 194 S.C. 421, 10 S.E.2d 465, 475 (1940); *Columbus Gas & Fuel Co. v. Pub. Util. Comm'n*, 292 U.S. 398 (1934); *Citizens for Fair Utility Rates v. Pub. Util. Comm'n of Tex.*, 924 S.W.2d 933 (Tex. 1995); *Lone Star Gas Co. v. State*, 153 S.W.2d 681 (Tex. 1941); *Pa. Elec. Co. v. Pa. Pub. Util. Comm'n*, 502 A.2d 130 (Pa. 1985); *Munn v. Illinois*, 94 U.S. 113 (1876); *Orlosky v. Penn. Pub. Util. Comm'n*, 89 A.2d 903 (Pa. 1952); *Com. Pub. Utility Comm. V. Laurel Pipe Line Co.*, 370 A.2d 1252 (Pa. 1977); *Jersey Cent. Power and Light Co. v. Fed. Energy Regulatory Comm'n*, 810 F.2d 1168 (D.C. Cir. 1987); *Coney v. Broad River Power Co.*, 171 S.C. 377, 172 S.E. 437, 438 (1933); *DePass v. Broad River Power Co.*, 173 S.C. 387, 176 S.E.325 (1934); *Shealy v. Southern Ry. Co.*, 127 S.C. 15, 120 S.E. 561 (1924); *Miss. Power Co. v. Miss Pub. Serv. Comm'n*, 168 So.3d 905 (Miss. 2015); *NEPCO Mun. Rate Comm. v. Fed. Energy Regulatory Comm'n*, 668 F.2d 1327 (D.C. Cir. 1981) (holding that used and useful was constitutionally *permissible*); *Re Southern Bell Telephone and Tel. Co.*, 1971 WL 266516 (S.C. Pub. Serv. Comm'n Dec. 22, 1971); *Re Lockhart Power Co.*, 1975 WL 410514 (S.C. Pub. Serv. Comm'n Jan. 10, 1975); *Hamm v. S.C. Pub. Serv. Comm'n*, 298 S.C. 309, 380 S.E.2d 428 (1989); *Daufuskie Island Util. Co. v. S.C. Office of Regulatory Staff*, 420 S.C. 305, 803 S.E.2d 280 (2017); *Util. Serv. of S.C. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 708 S.E.2d 755 (2011); *Patton v. S.C. Pub. Serv. Comm'n*, 280 S.C. 288, 312 S.E.2d 257 (1984); *Mims v. Edgefield Co. Water and Sewer Auth.*, 278 S.C. 288, 312 S.E.2d 257 (1984); *Smyth v. Ames*, 169 U.S. 466 (1898) (overruled); *Denver Union Stock Yard Co. v. United States*, 304 U.S. 470 (1938); *Gulf States Util. Co. v. Louisiana Pub. Serv. Comm'n*, 364 So.2d 1266 (La. 1978).

[12] In fact, one of the Attorney General's most cited cases, *Jersey Cent. Power & Light Co. v. FERC*, states, "The Supreme Court has repeatedly reaffirmed the "end result" standard of Hope Natural Gas." 810 F.2d 1168, 1177 (D.C. Cir. 1987).

the fair value of the property within the state of every public service corporation." ARIZ. CONST. art. XIV, § 14. This language was enacted prior to the *Hope-Bluefield* line of cases and specifically adopts a method which *Hope* rejected as unworkable and overly restrictive. Because of this specific provision enshrining the fair value method, the Arizona Supreme Court rejected *Hope*, stating that "[t]he *Hope* case cannot be used by the commission. To do so would violate our constitution." *Id.* at 382. The Court further rejected the prudent investment theory based on the constitutional requirement to use the fair value methodology, stating, "[i]rrespective of the merits, if any, of the prudent investment theory, because of our constitution the commission cannot use it as a guide in establishing a rate base." *Id.*

The Attorney General's Brief is wrong when it states that "the substance of the Arizona provision is precisely the same" as South Carolina's Constitution. (Att'y Gen. Br. at 24). South Carolina's Constitution has no requirement to use the fair value methodology, and, in fact, it is doubtful that the Attorney General would actually want to employ this methodology. SCE&G has numerous older and highly depreciated assets which, if the fair value methodology was used for rate making, could be valued at a much higher level for rate making purposes than original cost less depreciation method would allow.

The bulk of the cases and other material the Attorney General cites state only that the prudent investment rule is not constitutionally ***mandated.***[13] Moreover, the fact that the courts seriously considered arguments that the prudent investment rule might be constitutionally

[13] *See Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989); *Missouri ex rel. Sw. Bell Tel. Co. v. Pub. Serv. Comm'n*, 262 U.S. 276 (1923) (the Attorney General quoting the dissent for support while the major opinion cuts against him); *Jersey Cent. Power & Light Co. v. Fed. Energy Regulatory Comm'n*, 810 F.2d 1168, 1181 (D.C. Cir. 1987) (the Attorney General quoting the dissent for support while the majority states "we have already held that including prudent investments in the rate base is not in and of itself exploitative"); *NEPCO Mun. Rate Comm. v. Fed. Energy Regulatory Comm'n*, 668 F.2d 1327, 1333 (D.C. Cir. 1981); *Dem. Cent. Comm. of Dist. of Columbia v. Wash. Metropolitan Area Transit Comm'n*, 485 F.2d 786 (D.C. Cir. 1973); *S.C. Cable TV Assoc.*, 313 S.C. 48, 437 S.E.2d 38 (1993); *Simms v. Round Valley Light and Power Co.*, 294 P.2d 378 (Ariz. 1956).

mandated is entirely inconsistent with the assertion that it is constitutionally prohibited. In this case, the General Assembly chose to couple a fully-litigated pre-construction prudency review with statutory safeguards against the results of that pre-construction review being second-guessed with the benefit of hindsight. Doing so was well within the General Assembly's constitutional latitude in establishing structures and methods for utility ratemaking in South Carolina.

D. The Legislative History of Article IX, § 1 of the South Carolina Constitution Does Not Support the Claims that a New Constitutional Standard Was Intended for Rate Making.

The Attorney General contends that the term "public interest" was inserted into Article IX, § 1 of the South Carolina Constitution in 1973 as a means to elevate the "used and useful" principle to constitutional stature and otherwise to give the courts authority to second-guess legislative determinations as to what constitutes the public interest in utility rate making. (*See* Att'y Gen. Br. at 42-43.) This is not the case.

Article IX, § 1 of the South Carolina Constitution states only that, "The General Assembly shall provide for appropriate regulation of common carriers, publicly owned utilities, and privately owned utilities serving the public as and to the extent required by the public interest." (*See* Att'y Gen. Br. at 10.)

The Committee to Make a Study of the South Carolina Constitution of 1895 (the "West Committee") – which was charged with revising South Carolina's Constitution in the late 1960s and completely rewrote Article IX[14] – explained that it had "fully discussed the need for the regulation of corporations and utilities in the Constitution," and that it "***believe[d] that the regulation of common carriers, public utilities and corporations is a matter for statute and***

[14] *See* Memo No. 11, Tr. of the West Committee, Feb. 1, 1968.

not the Constitution." (Final Report of the Comm. to Make a Study of the S.C. Const. of 1895 at 106-07 (1969) (emphasis added).) As one committee member stated

> All I'm interested in doing is in the Constitution saying that the General Assembly shall regulate utilities, all utilities, no matter how they are owned or set up, but it doesn't impose any burden on the General Assembly that they don't want to assume.

(Tr. of the West Committee, Oct. 7, 1967, at 128 (Workman) (emphasis added).)[15] The West Committee clearly understood that the substantive rules that would apply to utility regulation would be statutory, not constitutional. There is no evidence to suggest that Article IX, § 1 was intended to impose a new constitutional requirement of "ratepayer fairness" on the General Assembly's legislative authority over utility regulation. Significantly, the General Assembly – with the report of the West Committee before it – adopted the committee's proposed language verbatim.

The legislative record makes it plain that Article IX, § 1 was never intended to create a new "ratepayer fairness" test for courts or others to apply in evaluating statutes enacted by the General Assembly related to the regulation of public utilities. No such new constitutional standard was ever envisioned.

E. The Attorney General Has Not Shown that the General Assembly's Determination that the BLRA Advanced the Public Interest Was "Clearly Wrong."

The Attorney General – though acknowledging that "the Legislature is the primary judge of what constitutes the 'public interest'" – contends that "the overarching defect in the BLRA is that it does not serve the 'public interest.'" (Att'y Gen. Br. at 55-56.) This is a staggering inconsistency.

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[15] Another member of the West Committee recognized that the language used in Article IX, § 1 was based on Kentucky's Constitution and "sort of mandates and shows your interest," but "does really nothing, though." (Tr. of the West Committee, Oct. 7, 1967, at 113 (Stoudemire).)

The Attorney General's argument is based on the mistaken assumptions that: (1) the only public interest involved in ratemaking is ensuring the perpetuation of low utility rates; and (2) non-legislative bodies like the Attorney General and the Commission are better able to identify and weigh the public interests than the General Assembly. As to the first point, the United States Supreme Court has long-recognized that low utility rates do not always serve the public interest. To the contrary, the public interest is adversely affected by decisions that "impair the financial ability of the public utility to continue its service." *Fed. Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956). Indeed, ratepayers and the public also have an interest in ensuring that utilities remain financially viable and able to provide reliable service to them in the future. *See, e.g.*, *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 113 (1958) (recognizing that "the public interest requires the protection of consumers from excessive prices," but that it also implicates "the legitimate interests of [utilities] in whose financial stability the [energy]-consuming public has a vital stake"); *Garkane Power Ass'n v. Pub. Serv. Comm'n*, 681 P.2d 1196, 1207 (Utah 1984) (per curiam).

As to the second point, the Attorney General cannot show that, in adopting the BLRA, the General Assembly was "clearly wrong" in its assessment of the public interest at the time that statute was adopted. See *Wolper v. City Council of City of Charleston*, 287 S.C. 209, 216, 336 S.E.2d 871, 875 (1985) (holding that South Carolina courts will not interfere with findings about the public interest/purpose unless that finding is "clearly wrong").

The Attorney General himself identified the overarching public interest underlying the BLRA in its Advisory Opinion:

> Enactment of the [BLRA] in South Carolina was part of a much larger effort throughout the nation to incentivize construction of new nuclear power plants by utilities as a means of establishing energy independence.

(Att'y Gen. Advisory Op. at 2.)

The General Assembly understood, as the Commission later found, that in the mid to late 2000's, adding base load coal generation to meet customer demands was not commercially feasible "due to the cost of constructing a fully environmentally-compliant coal plants, as well as . . . . increases in the cost of coal and the potential costs associated with CO_2 emissions from coal generation." (Order No. 2009-104(A) at 37.) Fossil fuels – both coal and natural gas – had "become increasingly uncertain as to both price and supply and [were] increasingly subject to the risk and volatility of global commodity markets." (*Id.* at 40.) At that time, natural gas generation was considered intermediate capacity and not base load capacity. (*Id.*) Adding combined cycle gas generation meant potentially increasing a utility's reliance on fossil fuels to a very high percentage of system capacity, with the risks and vulnerabilities that entailed, and similar increases in CO_2 emissions. (*Id.)*

As the Commission recognized not long after the BLRA was adopted:

> [T]he principal benefit of nuclear construction, in addition to lower forecasted costs, is the fact that it helps insulate customers from the price volatility and supply risk that are increasingly associated with fossil fuel fired generation. Nuclear generation also insulates customers from future CO_2 and other environmental compliance costs associated with fossil fuels, which are likely to be significant.

(Order No. 2009-104(A) at 56.) The Attorney General has similarly stated that:

> The legacy of the last significant build-out of baseload generation is billions of dollars of cost disallowances when plants were cancelled before going into service (i.e., before becoming "used and useful") or when commissions otherwise found imprudence. After this experience, utilities were understandably reticent to undertake the types of capital-intensive projects that are necessary to provide new, cleaner, and more efficient baseload power. Consequently, a number of states passed statutes and implemented

> accompanying regulations to mitigate the risks utilities assume for such projects.

(Att'y Gen. Advisory Op. at 2 (quoting Galloway and Cousineau, *Cost Recovery for Pre-Approved Projects*, 151 NO. 6 PUBL. UTIL. FORT. 54, 55 (June 1, 2013).)

Before the BLRA was adopted, it was financially impossible for South Carolina utilities to consider nuclear generation. In adopting the BLRA, the General Assembly determined the public interest supported adopting the statutory changes needed to make the construction of nuclear generation possible for South Carolina utilities. It addressed the two specific challenges that had to be addressed. Those challenges were explained in detail in the testimony in Docket No.2016-223-E, the relevant portions of which are attached as ***Exhibit 4.***

One of these challenges was "[r]ecovering the financing costs of a project during construction" so that a utility would be able to pay debt service, maintain coverage ratios, pay dividends on stock and otherwise maintain its financial viability during the lengthy nuclear construction period. (*Id.*) The legislative response to this challenge was the revised rates mechanism that "allows for annual rate adjustments through revised rates filings to cover the financing costs of approved nuclear construction projects pending their completion." (*Id.)*

The other challenge was "the threat of construction cost disallowances" which "can drive investors away and make it impossible for a utility . . . to obtain financing at reasonable terms." (*Id.)* The legislative response was to adopt the BLRA provisions providing for "prudency reviews . . . made based on plans and forecasts before construction begins [under which the] Commission determines whether or not it is prudent to proceed with the project under the construction plan and with the contractors and the Engineering, Procurement, and Construction ("EPC") contract proposed by the Company." (*Id.*) The purpose of those reviews was to assure "the financial community that disallowances based on after-the-fact prudency

challenges will not impair their ability to recover the capital they invest in the project unless there is imprudence by the utility in administering the project." (*Id.*)

In promoting the availability of nuclear power through the BLRA, therefore, the General Assembly exercised its "considerable latitude to determine what the 'public interest' is in a given instance." (Att'y Gen. Br. at 29.) It addressed precisely the issues that needed to be addressed and did so in a rational and fully responsible way. The General Assembly's determinations were not "clearly wrong," so the agencies and courts of this State must defer to its legislative judgment. *See Wolper*, 287 S.C. at 216, 336 S.E.2d at 875.

F. The BLRA Does Not Violate the Equal Protection Clause.

The Attorney General wrongly suggests that the BLRA violates the Equal Protection Clause for two reasons. (*See* Att'y Gen. Br. at 17-18, 72-75.) His first argument is that the BLRA is unconstitutional because it only applies to nuclear power plants and not other base load-capable sources of energy. (Att'y Gen. Advisory Op. at 17, 72-74.) Second, it allegedly "discriminates against present ratepayers of a BLRA utility and in favor of its future ratepayers." (*Id.* at 18, 74-75.) These are both facial challenges to the BLRA over which the Commission lacks jurisdiction.

Furthermore, as the Attorney General concedes, the BLRA's constitutionality is determined by applying the rational basis test. (*See* Att'y Gen. Br. at 17.) That test is one of the most deferential standards in constitutional law. Indeed, on a rational-basis review, a classification such as the one used in the BLRA comes to the Commission "bearing a strong presumption of validity." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993). It is "a paradigm of judicial restraint." *Id.* The General Assembly's classification decisions must be given "great deference" under a rational basis test because it "presumably debated and weighed the advantages and disadvantages of the legislation at issue." *Lee v. S.C. Dep't of Nat. Res.*,

339 S.C. 463, 467, 530 S.E.2d 112, 114 (2000). "[T]hose attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it." *Beach Commc'ns, Inc.*, 508 U.S. at 315. Similarly, when applying the rational basis test, "[a] legislative enactment will be sustained against a constitutional attack if there is any reasonable hypothesis to support it." *Lee,* 339 S.C. at 467, 530 S.E.2d at 114 (internal citation and quotation marks omitted).

The rational basis for the distinction made in the BLRA related to base load power sources is clearly explained the testimony in Docket 2016-223-E (***Exhibit 4***):

> Some years ago the Commission recognized . . . [the difficulty in financing major power projects] and began to authorize utilities to include the financing costs of plants in rates before they were completed. This was done in general rate cases by recognizing the financing costs associated with construction work in progress ("CWIP") as a revenue requirement for ratemaking purposes. The Commission has historically allowed a company to apply its weighted average cost of capital to its CWIP to determine the amount of revenue needed to support the common stock and bonds issued to finance construction. . . . .
>
> This CWIP based method of recovering financing costs required the utility to file general rate cases stair stepped in one or two-year intervals during plant construction. SCE&G successfully used this approach when building its last coal plant, Cope Station (1995), and its most recent combined cycle natural gas plant, Jasper Station (2004). During construction, there were a total of six separate rate adjustments which placed some part of the financial costs of the capital spent on those plants into rates.
>
> Cope and Jasper, however, took three to five years to build, not thirteen as is the case for nuclear. Outlays for those plants were in the hundreds of millions of dollars, not billions. If this approach were to be used to support a nuclear construction project, it would require SCE&G to litigate full electric rate cases every year or two for approximately 12 years. Neither SCE&G nor its investors considered this to be practical.

Accordingly, a rational basis for distinguishing between nuclear construction, on the one hand, and coal and natural gas construction, on the other, was the length of time required to build the different types of units, and the costs involved. This is a rational and entirely

sufficient basis to justify the distinction. This rationale applies with greater force to solar and wind projects, which have much lower costs per project and require a shorter time to construct.

The Attorney General further contends that the BLRA is under-inclusive because it does not apply to all types of power generating activities.[16] (*See* Att'y Gen. Br. at 17, 72-74.) What he fails to recognize, however, is that the Equal Protection Clause only requires "that all ***members of a class*** be treated alike under similar circumstances and conditions," not that all members of a class be treated alike under all circumstances and all conditions. *Broome v. Truluck*, 270 S.C. 227, 230, 241 S.E.2d 739, 740 (1978) (emphasis added). In the context of power generation, the applicable class is composed of utilities, and the law treats all utilities the same. If the utility seeks to begin a nuclear power project, it can take advantage of the BLRA. If, however, it seeks to engage in other forms of power generation, the BLRA does not apply. Said differently, the BLRA does not provide for the disparate treatment of any members in a particular class.[17] To the contrary, all utilities are "treated alike under similar circumstances and conditions." *Id.*

Significantly, the United States Supreme Court previously determined that a statute with a similar purpose – the Price-Anderson Act – withstood rational-basis scrutiny because it furthered "the important congressional purpose of encouraging private participation in the exploitation of nuclear energy." *Duke Power Co. v. Carolina Envt'l Study Grp., Inc.*, 438 U.S.

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[16] The Attorney General's other Equal Protection argument – that "the BLRA discriminates against present ratepayers of a utility operating under the BLRA and in favor of that utility's future ratepayers," (Att'y Gen. Br. at 75) – lacks any merit for two reasons. First, it is merely a reiteration of their "used and useful" argument. Second, he has not identified any case in any jurisdiction where the Equal Protection Clause has been used to invalidate a statute or regulation based on the disparate treatment of temporally distinct groups of people. Each generation of utility customers benefits from the investments in infrastructure paid for by its predecessors. Each pays for infrastructure that will benefit its successors.

[17] Notably, even if the statute did discriminate against different, similarly-situated utilities (which it does not), neither ORS nor the Attorney General would have standing to raise an Equal Protection challenge to the BLRA on behalf of those utilities.

59, 93 (1978). There is simply no colorable argument that the BLRA violates the Equal Protection Clause, and the Attorney General's argument on that issue should be rejected in its entirety.

G. The Authorities Cited in the Attorney General's Brief Do Not Support the Claim that the Customers Have a Property Interest in Rates that Can Trump the Constitutional Prohibition Against Uncompensated Takings.

As stated in SCE&G earlier brief, customers have important statutory rights and interests and properly seek to be assured that the rates they pay are not excessive. However, customers' statutory rights are implicated only after the regulator makes the threshold decision of what minimum rate required to ensure that the utility is reasonably compensated for the public's use of its system. As the United States Supreme Court has stated, "the public interest requires the protection of consumers from excessive prices," but the law must also protect the "the legitimate interests of [utilities] in whose financial stability the [energy]-consuming public has a vital stake" *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 113 (1958). The utilities' interests in this regard are of uniquely constitutional stature, because of the Takings Clause.

Accordingly, the Attorney General's approximately 180 cases do not establish that utility customers have a constitutionally protected property interest in rates that can overcome a private utility's rights under the Takings Clause.[11] More importantly, the Attorney General

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[11] *See Jersey Central Power & Light v. FERC*, 810 F.2d 1168 (D.C. Cir. 1987); *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *Mims v. Edgefield Co. Water & Sewer Auth.*, 278 S.C. 554, 299 S.E.2d 484 (1983); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *FPC v. Memphis Light, Gas & Water Div.*, 411 U.S. 458 (1973); *Pa. Coal v. Mahon*, 260 U.S. 393, 415 (1922); *Johnson v. Piedmont Municipal Power Agency*, 277 S.C. 345, 383 S.E.2d 476, 486 (1980) *E. Enter. v. Apfel*, 524 U.S. 498, 538 (1998); *Horne v. Dep't of Agriculture*, 135 S.Ct. 2419 (2015); *Montgomery v. Carter Cty., Tenn.*, 226 F.3d 758, 766 (2000); *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984); *Kelo v. City of New London*, 545 U.S. 469 (2005); *Citizens Action Coal. of Ind., Inc. v. N. Ind. Pub. Serv. Co.*, 485 N.E.2d 610 (Ind. 1985); *Mo. Pac. R.R. Co. v. Nebraska*, 164 U.S. 403 (1896); *Smalley v. Duke Energy*, 154 So. 3d 439 (Fla. 2014); *El Paso Elec. Co. v. Pub. Util. Comm'n of Tex.*, 917 S.W.2d 846, 882 (Tex. 1995); *Ga. Dep't of Transp. v. Jasper Co.*, 355 S.C. 631, 586 S.E.2d 853 (2000); *Edens v. City of Columbia*, 228 S.C. 563, 9. S.E.2d 280 (1956); *Karesh v. City Council of Chas.*, 271 S.C. 339, 247 S.E.2d 342 (1978); *S.C.*

completely overlooks the key case holding to the contrary, *Holt v. Yonce*, 370 F. Supp. 374 (D.S.C. 1973) (three-judge court) (per curiam). In *Holt*, indigent ratepayers sued members of this Commission in federal court after the Commission allowed SCE&G to effect a temporary rate increase. *See id.* at 374–75. The ratepayers claimed the rate increase violated the Fourteenth Amendment's Due Process Clause because they would be deprived, without a hearing, of the electricity they could no longer afford to buy from the utility. *See id.* at 375–76. A three-judge panel of the U.S. District Court for the District of South Carolina dismissed that claim, holding that a rate increase is not a deprivation of property for due-process purposes. *See id.* at 377–79. The Supreme Court of the United States summarily affirmed the judgment of dismissal. *See Holt v. Yonce*, 415 U.S. 969 (1974).[12]

The Attorney General does not so much as mention *Holt*, even though that case involves many of the same parties, is squarely on point, and undermines the central premise of his arguments against the BLRA under the Takings and Due Process Clauses. Efforts to distinguish *Holt* would fail in any event, because the underlying principle is so well settled. The government does not take away ratepayers' money by setting a price they can pay in exchange for electricity, because such a purchase is not compelled by the government.[13]

Cable TV Ass'n v. Pub. Serv. Comm'n, 313 S.C. 48, 437 S.E.2d 38 (1993). The Attorney General cites *Myers v. Blair Tel. Co.*, 230 N.W.2d 190, 196 (Neb. 1975), where the court observed "[a]s a matter of elemental justice, consumers of utility services are entitled to the same protection against confiscation of property or arbitrary action on the part of the utility as are the utilities." This observation, however well-intentioned, can hardly be taken as a serious attempt to reverse the well-established principle that customers do not have a constitutionally recognized property interest in utility rates.

[12] This decision is binding precedent in any litigation involving the BLRA, because "[s]ummary affirmances . . . without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam).

[13] *See, e.g., Anco, Inc. v. State Health & Human Servs. Fin. Comm'n*, 388 S.E.2d 780, 786 (S.C. 1989) ("[P]articipation in the Medicaid program is voluntary. . . . [T]his voluntariness forecloses the possibility that the statute could result in an imposed taking of private property which would give rise to the constitutional right of just compensation." (internal quotation marks omitted)); *Bowles v. Willingham*, 321 U.S. 503, 517 (1944) ("We are not dealing here with a situation which involves a 'taking' of property. . . . There is no requirement that the apartments in question be used for purposes which bring them under the [price-control] Act."); *Hollis v. Kutz*, 255

H. The Authorities Cited in the Attorney General's Brief Do not Support the Claim that the BLRA Violates Procedural Due Process.

None of the Attorney General's approximately 180 cases hold a statutory scheme is unconstitutional because it allows rates to be put into effect based on notice and written comments, subject to a subsequent contested case hearing and refunds if disallowed.[18]

As to the latter point, the Attorney General discusses at length the case of *Barasch v. Pa. Pub. Util.*, 546 A.2d 1296 (Pa. 1988), but misreads that case. *Barasch* involved a statutory scheme where interested parties had no right to an administrative hearing either before or after the commission issued its final order. *Id.* at 1306. The only recourse was to appeal the final agency order in the courts. The *Barasch* Court cited with approval *Allegheny Ludlum Steel Corp. v. Penn. Pub. Util. Comm'n*, 459 A.2d 1218 (1982), which held that due process rights were fully protected where the relevant statutes provided an opportunity for an administrative hearing after the commission's initial order was issued. That is precisely the approach that the

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U.S. 452, 455 (1921) ("The plaintiffs are under no legal obligation to take gas nor is the Government bound to allow it to be furnished. If they choose to take it the plaintiffs must submit to such enhancement of price, if any, as is assignable to the Government's demands."); *Carson v. Sewer Comm'rs*, 182 U.S. 398, 402–03 (1901) ("But of what property has he been deprived? None whatever. . . . The lot owner could use the sewer or not, as he chose. If he used it, he paid the rental fixed by the ordinance. If he made no use of it, he paid nothing."); *U.S. Light & Heat Corp. v. Niagara Falls Gas & Elec. Light Co.*, 47 F.2d 567, 570 (2d Cir. 1931) ("The consumer was not obliged to purchase gas; he was privileged to do so."). The Mississippi case cited by the Attorney General does not address any of these cases, so it has neither precedential value nor persuasive force. *See* Att'y Gen. Br. at 64–65 (citing *Miss. Power Co. v. Miss. Pub. Serv. Comm'n*, 168 So. 3d 905 (Miss. 2015), for the notion that a rate increase deprives ratepayers of a property interest in money); *cf. Nolan v. Daley*, 73 S.E.2d 449, 451 (S.C. 1952) ("While this Court is in no sense bound by the construction of similar Acts by the courts of another state, we may well be moved to adopt the construction placed upon such Acts by such courts when we are impressed with the logic and reasonableness of their conclusions . . . .").

[18] *See St. Joseph Stockyards Co. v. U.S.*, 298 U.S. 38 (1936); *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *Smith and Smith, Inc. v. SC PSC*, 271 S.C. 405, 247 S.E.2d 677 (1978); *Ohio Bell Tel. Co. v. Pub. Util. Comm'n*, 301 U.S. 292 (1937); *Miss. Power Co. v. Miss. Pub. Serv. Comm'n*, 168 So.3d 905 (Miss. 2015); *Popowsky v. Pa. Pub. Util. Comm'n*, 805 A.2d 637 (Pa. 2002); *S.C. Energy Users Comm. v. SCE&G*, 388 S.C. 486, 697 S.E.2d 587 (2010); *S.C. Energy Users Comm. v. SCE&G*, 410 S.C. 348, 764 S.E.2d 913 (2014); *State v. Dykes*, 403 S.C. 409, 744 S.E.2d 505 (2013); *Ne. Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612, 623 (6th Cir. 2016); *Richards v. Jefferson Cty.*, 517 U.S. 793 (1996); *In Re Application of Bellsouth Telecomm., Inc.*, 2005 WL 7149822 (Mar. 24, 2005). The Attorney General also relies upon *Porter v. S.C. Pub. Serv. Comm'n*, 338 S.C. 164, 525 S.E.2d 866 (2000) to support its position that the current statutory scheme violates due process. However, *Porter*'s focus was the adequacy of the specific notice document at issue. The Attorney General has not made any argument that the notice provided in prior rate cases was inadequate, nor has he put forth any evidence of the same.

BLRA takes in revised rates proceedings. S.C. Code Ann. § 58-33-287. Interested parties are given notice, an opportunity to comment in writing, and an opportunity to appeal an initial revised rates order to the Commission through a full contested case proceeding before it becomes final. *Id.* Thus, *Barasch* directly supports SCE&G's contention that the BLRA is constitutional.

In fact, the due process protections that the BLRA provides regarding revised rates is fully consistent with practice under the Federal Power Act.[19] It is fully consistent with the rate making statutes that were in force in South Carolina when the Constitution was last amended.[20]

Each time that SCE&G sought revised rates, SCE&G published a notice in five newspapers of general circulation within its service territory (The State, the Post and Courier, the Aiken Standard, the Orangeburg Times and Democrat, and the Island Packet.) The notices listed the details of the filing; gave specific directions on when, where and how interested parties could file comments with ORS or the Commission; and when, where and how such parties could appeal an initial revised rates order and demand a full contested case hearing before the Commission. The form of the notice was as directed by the Commission's clerk's office. The notices and affidavits of publication are all available in the dockets of each of the nine cases in which revised rates were issued.[21] When each revised rates order was issued,

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[19] *Compare* S.C. Code Ann. §§ 58-33-280 *et seq.* (providing the procedures for revised rates under the Base Load Review Act that require notice to customers), *with* 16 U.S.C. § 824 (providing similar mechanisms pursuant to the Federal Power Act), *and* 15 U.S.C. § 717c (providing similar mechanisms pursuant to the Natural Gas Act).

[20] Prior to 1983, the South Carolina Code allowed for rates to go into effect without any hearing if the utility filed a bond with the Commission. See S.C. Code Ann. § 58-27-880 (1976). This rate under bond procedure was the procedure in effect when the South Carolina Constitution was amended. Presumably, it was considered Constitutional given that no effort was made to revise the Constitution to limit this procedure. The statute was not repealed until 1983 with the passage of Act No. 138.

[21] 2016: https://dms.psc.sc.gov/Attachments/Matter/55b691ba-645e-49d2-9567-f31bf2d14d86
2015: https://dms.psc.sc.gov/Attachments/Matter/31c5ad10-786c-4cce-93c9-7fd4a7670750
2014: https://dms.psc.sc.gov/Attachments/Matter/0e886067-155d-141f-23fa6a17548f4132
2013: https://dms.psc.sc.gov/Attachments/Matter/0afb9429-155d-141f-2306e4b2016c3cee
2012: https://dms.psc.sc.gov/Attachments/Matter/d24b2215-155d-2817-101d096024914e3e

SCE&G immediately gave all customers notice through bill insert. *See* S.C. Code Ann. § 58-33-280(H). These actions clearly satisfied procedural due process.

CONCLUSION

This proceeding involves a matter of extraordinary importance to the State of South Carolina and the 718,000 customers SCE&G serves. As Ms. Lapson has stated:

> Granting ORS's Request could be the first step in a quick cascade that would result in SCE&G's illiquidity and financial distress and could lead to a bankruptcy petition. While a petition for bankruptcy protection is a possible outcome, it is not an inevitable outcome at this point. Paths are available for resolution that would spare the extreme waste and burden of a bankruptcy proceeding, and they are largely in the hands of this Commission and other public officials and legislators. By granting the ORS Request, the Commission would take a first step in hastening that cascade of financial calamity.

(***Exhibit 3*** at 22.)

The path set out for it by ORS is not the path that the Commission should take here. Instead, the Commission should recognize the need for calm and restraint and time for passions to cool and for a reasonable resolution of these matters to emerge. SCE&G has publically proposed a settlement[22] under which

- The approximately $1 billion Toshiba guarantee settlement payment and the approximately $2 billion in tax benefits (at current tax rates) would go to reduce the abandoned plant costs to be recovered from customers; [23]

2011: https://dms.psc.sc.gov/Attachments/Matter/fa1d9261-085a-77d2-903f57090b6b469e
2010: https://dms.psc.sc.gov/Attachments/Matter/8e7c55cf-cbc6-57ef-980c6fd2ca435ab4
2009: https://dms.psc.sc.gov/Attachments/Matter/4fe62a42-0e82-e972-0223dee9d4008ae0
2008: https://dms.psc.sc.gov/Attachments/Matter/7e7f0b8e-f9aa-b238-91c297c1c9d05c9d

[22] *See SCE&G Proposes $4.8 Billion Solution to Replace New Nuclear Project* (Nov. 16, 2017), *available at* https://www.scana.com/docs/librariesprovider15/pdfs/press-releases/11162017-sceg-proposes-$4-8-billion-solution-to-replace-new-nuclear-project.pdf?sfvrsn=0.

[23] Under ORS's proposal, if all costs of the nuclear project were deemed to be outside of regulated investment, then existing ratemaking principles would indicate that these two items would also be outside of regulation.

- The Company absorbs the cost of amortizing the remaining project costs into retail electric expenses with no rate increase;
- Transmission investment is segregated from other abandonment costs and put into rate base;
- SCE&G provides an immediate 3.5% rate decrease for retail electric customers; and
- SCE&G provides 540 MW of combined cycle gas generation to meet the immediate need for additional generation on its system at no acquisition cost to customers.

A settlement along these lines could result in just the sort of "fair and reasonable" resolution of these matters that the law and the Constitution support. ORS's Request, however, is the antithesis of such a settlement. As Ms. Lapson states, "granting the relief requested by the ORS could set off forces that would sweep the situation beyond the Commission's control and into the jurisdiction of the federal bankruptcy court." Exhibit 3 at 22.

The specific issue before the Commission is SCE&G's Motion to Dismiss based on the fact that ORS has not conducted the "preliminary investigation" sufficient to support a decision by the Commission to deem that the rates ORS has requested are "fair and reasonable." S.C. Code Ann. § 58-27-920. The failure by ORS to satisfy its statutory obligations before filing for relief under S.C. Code Ann. § 58-27-920 is beyond question. The information provided by SCE&G clearly demonstrates that the proposed rates do not and cannot meet the fair and reasonable standard. For these reasons, the ORS's Request must be dismissed.

Respectfully submitted,

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Attorneys for South Carolina Electric & Gas Company

Cayce, South Carolina
December 7, 2017

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2017-305-E

IN RE:

Request of South Carolina Office of Regulatory Staff for Rate Relief to SCE&G Rates Pursuant to S.C. Code Ann. § 58-27-920

CERTIFICATE OF SERVICE

This is to certify that I have caused to be served this day one copy of the **SCE&G'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS** to the persons named below at the addresses set forth via U.S. First Class Mail and electronic mail:

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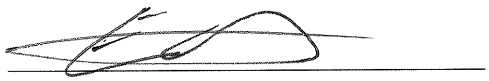

Cayce, South Carolina
December 7, 2017